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In The

Supreme Court of the United States

October Term, 1997

MARILYN ZIEMKE, CELIA SHAR and ISRAEL TRAVEL ADVISORY SERVICE, INC.,

Petitioners,

vs.

SHALOM ALMOG, IRIT ALMOG and BEN AMI GELLER,

Respondents.

On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION FOR RESPONDENT BEN AMI GELLER

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QUESTIONS PRESENTED FOR REVIEW

When the facts of the case are accurately presented, the issues are:

I. Should the petition be denied when defendants/petitioners failed to raise in the New Jersey Appellate Division the issue of whether the punitive damages verdict violated the Free Speech clause of the First Amendment, and the petition misconstrues the caselaw regarding First Amendment speech in defamation actions?

II. Did the New Jersey Appellate Division properly determine that New Jersey law applied to this private defamation suit when New Jersey's interest in deterring egregious and tortious conduct is not outweighed by any substantial Israeli interest?

III. Did the New Jersey Appellate Division correctly determine that the jury charge and jury interrogatories, which permitted individual allocations of liability but did not require them, were not plainly erroneous when defendants presented themselves as one "unit," jointly conspired to defame respondent Geller, and failed to object thereto?

IV. Did the New Jersey Appellate Division properly determine that the jury was not advisory when the lawyers proceeded tactically on the understanding that this was a jury trial, as did the court, the jurors had no idea during their deliberations that their status was anything but that of the ultimate finders of the facts, and nothing said by the trial judge tainted the way the lawyers tried the case to the jury or the way the jury deliberated?

V. Should the petition be denied when defendants refused to provide any information regarding their financial status; waived their right to complain about the amount of punitive damages; and the punitive damages awards were commensurate with the evidence of defendants' wealth and the malicious, destructive and egregious nature of the defendants' acts?

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APPENDIX

Appendix A — Correspondence Dated January 29, 1997 From Andrew S. Berns, Esq., Sent In Response To A Request From The Honorable Sylvia B. Pressler, P.J.A.D., After Oral Argument In The Appellate Division, Regarding Defendants' History Of Refusals To Disclose Their Financial Information 1a

STATEMENT OF THE CASE[1]

The defendants/petitioners are owners/operators of a company that coordinates packaged tours for United States citizens travelling to Israel. The respondents are defendants' former Israeli business associates. This case arose after defendants maliciously made false and defamatory statements about the respondents in an attempt to reduce the fierce competition from a very lucrative business, which resulted when the business relationships between the parties broke down. The petition seeks this Court's review of the opinion of the New Jersey Superior Court, Appellate Division, published as *Almog v. Israel Travel Advisory Service, Inc., et al.*, 298 N.J. Super. 145, 689 A.2d 158 (App. Div. 1997), reproduced at Pet. App. 1-17.

However, this Court should deny defendants' petition because it grossly misrepresents this case both factually and procedurally. In addition, the petitioners' request to review the issue of whether punitive damages in defamation cases violate the First Amendment Free Speech clause is improper and should be denied because defendants never raised this issue prior to their petition for certification to the New Jersey Supreme Court, which, "after full briefing and oral argument," Pet. 1, correctly dismissed defendants' appeal, and determined that certification was improvidently granted. *Almog v. Israel Travel Advisory Service, Inc., et al.*, 152 N.J. 361, 704 A.2d 1297 (1998), reproduced at Pet. App. 26-27.

A. Defendants Waived Their Right To Complain About The Punitive Damage Awards.

From 1978 until 1990, respondent Ben Ami Geller ("Geller") was a licensed tour guide in Israel working as an independent contractor for defendants Marilyn Ziemke ("Ziemke") and Celia Shar ("Shar"), United States citizens, who own and operate Israel Travel Advisory Service, Inc. ("ITAS"), a New Jersey corporation

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1. Citations to the record below will be in the following form: "Pet.#" refers to defendants' petition for a writ of certiorari to this Court; "Pet.App.#" refers to defendants' Appendix to their petition; "Db#" refers to a page in defendants' brief filed in the Superior Court, Appellate Division; "Da#" refers to a page in defendants' Appendix to their brief filed in the Superior Court, Appellate Division; "Cca#" refers to a page in respondent Geller's Appendix to his brief filed in the Superior Court, Appellate Division; "Geller App.#" refers to respondent Geller's Appendix to this brief; "T#" refers to the trial transcript.

which provides packaged tours to Israel for United States citizens. The petition describes ITAS as a "small travel agency . . . [which defendants operate] out of their home in Livingston, New Jersey." Pet. 3. However, there is nothing small about ITAS or the services it provides. For over 20 years, ITAS has been almost exclusively providing packaged tours to Israel for citizens of the United States, sending thousands of people to Israel. Da1 to Da48, Da408 to Da449. In fact, defendants run the second largest tour operation, behind only the United Jewish Appeal; even the Appellate Division found that "the business was highly successful, ITAS sending between 3,000 and 3,500 tourists to Israel annually at a net profit of $500 each," and that "in more recent years . . . the business was even more financially successful." *Almog*, *supra*, 298 N.J. Super. at 149.

Notwithstanding defendants' proven financial success, the petition leads this Court to believe that the defendants will become destitute in light of the verdicts. Pet. 7-8, 18. However, defendants were requested on multiple occasions to provide evidence regarding their assets and wealth, and were provided every opportunity to establish the likelihood of any such "destitution;" however, defendants made a strategic decision to refuse to disclose their assets and wealth. (Refer to history of defendants' refusals to disclose their financial information, contained in correspondence dated 1/29/97 from Andrew S. Berns, Esq., sent in response to a request from the Honorable Sylvia B. Pressler, P.J.A.D., after oral argument in the Appellate Division, Geller App. 1a-5a). In addition, defendants failed to argue against the amount of the punitive damages verdict in the New Jersey Appellate Division.

Thus, the Appellate Division appropriately determined that defendants waived their right to complain about the punitive damage awards. *Almog*, *supra*, 298 N.J. Super. at 161-162. It would be unfair and an incredible waste of additional judicial time and energy to hear them complain now, after they have been provided every opportunity, but refused to provide any information that might have established the claimed excessiveness of the punitive damages verdict.

B. Defendants' Defamatory Statements Against Geller And Almog Were False And Were Made With Reckless Disregard Of Their Truth Or Falsity.

The petition further misleads this Court to believe that defendants' defamatory statements against the respondents were true. For example, the petition states that in "October, 1988, Geller traveled from Israel to New Jersey to meet with Shar and Ziemke to report a very serious matter: Almog was embezzling money from ITAS," and that "Geller substantiated this claim with documentation." Pet. 3, 13. This is wholly false.

In 1988, Israel Rodrigue, the owner of Abir Travel & Tour, Ltd. (the Israeli land tour operator handling ITAS' business at the time), told Geller that Almog was overcharging ITAS. T109-23 to T111-7, 8/2/93. Contrary to petitioners' claim that "Geller substantiated this claim with documentation," Pet. 3, Rodrigue showed petitioners documents that he claimed reflected overcharges. T71-8 to T74-6, 8/11/93 Vol. I. Because Geller had never been involved in pricing, he had no way of knowing if these documents substantiated the allegations against Almog. T73-8 to T73-19, 8/11/93 Vol. I. The petition further states that an "accounting firm confirmed that Almog had misappropriated large sums of money from ITAS." Pet. 3, 13. In support of this claim, the petition cites merely defendants' allegations in the complaint they filed in Israel. The report that allegedly substantiated petitioners' claim was never entered into evidence, much less produced, in this matter[2].

Defendants' campaign to defame did not stop with Almog. When Geller severed his relationship with ITAS in late 1990, T12-2 to T12-5, 8/11/93 Vol. II, defendants Shar and Ziemke accused him of improperly competing with ITAS, and defaming ITAS. T71-4 to T71-14, 8/9/93 A.M. Session. Subsequent to June, 1990, ITAS, Shar and Ziemke embarked on their campaign to discredit and defame Geller and to injure his personal and professional reputation. T96-17 to T100-3, 8/11/93 Vol. I. Evidence at trial established that defendants maliciously defamed Geller by speaking and writing to individuals throughout the United States

2. In fact, the petition states that defendants never produced the alleged accountant's report due to "evidentiary considerations and major errors by trial counsel." Pet. 13.

and in Israel with the intent to disparage Geller's personal and professional reputation. For example, on September 15 and 16, 1990, defendants wrote to the president of a land tour agency in Jerusalem and alleged that Geller was dishonest, that he was "for sale," and that he was a thief, among other things. Cca65 to Cca79. In correspondence dated December 9, 1990, which was distributed to numerous persons in New Jersey, Illinois, Massachusetts and Florida, defendants accused Geller of being a dishonorable man who was unethical in his business practices. T60-18 to T63-7, 8/9/93 P.M. Session; Cca78 to Cca79.

Defendants also defamed Geller in telephone conversations and correspondence to Rabbis and Presidents of Synagogues in the United States in order to persuade them to refrain from professional dealings with Geller, and to force him out of the U.S.-Israeli tourism business. T81-16 to T83-20, 8/9/93 A.M. Session; Cca76 to Cca77.

In addition, defendants admittedly reported Geller to the Israeli Tax Authorities with the malicious intent of "getting even," and not because they were requested to do so by the Israeli tax authority as the petition erroneously claims at pet. 4. T63-9 to T75-21, 8/9/93 P.M. Session; T3-1 to T20-24, 8/9/93 Vol. III; T86-3 to T87-12, 8/12/93 Vol. I.

Finally, with respect to the issue of the Israeli Tax Authorities, defendants again misstate and take out of context the trial record and provide this Court with less than an accurate account of what actually transpired. In discussing the ramifications of reporting Geller to the Mas Hachnasa (the Israeli Tax Authority) at Pet. 4, defendants again claim that Geller's trial testimony was flawed and that the "cofer" he was forced to pay to avoid unjustified incarceration was ". . . a civil fine in Israel that was paid to avoid criminal indictment." As a matter of fact, even though Geller had paid what is termed a "cofer" under Israeli law in order to avoid any and all further dealings with the Mas Hachnasa, the authorities at the Mas Hachnasa accepted Geller's tax and other financial documentation without negotiation during the course of their subsequent investigation of Geller. The "cofer" was paid by Geller, even though he was innocent of any wrongdoing, to prevent Mr. Geller from having to spend the evening in jail at the time he was

being questioned by the officials at the Mas Hachnasa. Cca 476 to Cca 486.

Defendants sought every opportunity to defame Geller, even to their own prospective United States' client base. For example, when Ms. Rena Levy called ITAS to inquire about Israeli tours, Defendant Ziemke told her that Geller had been fired by ITAS and was a liar, and that defendants were suing Geller for copyright infringement. T27-9 to T53-20, 8/11/93 Vol. I.

Defendants did not limit their malicious gossip to Geller's professional life, but also alleged that Geller had an extramarital affair with the adult daughter of the owner of an often used vendor in Israel, The Lido Restaurant. T48-12 to T61-14, 8/9/93 Vol. III.

Contrary to defendants' attempts to show otherwise, the jury found that all of defendants' defamatory statements against Geller and Almog were not only false, but were made with knowledge that they were false and/or with reckless disregard of their truth or falsity. T57-13 to T58-9, 8/16/93; Da464.

C. The Appellate Division Did Not Elevate The Verdict of An Advisory Jury.

This matter was tried before the Honorable Douglas T. Hague, J.S.C., and a jury from July 12 through August 13, 1993. The punitive damage phase of the trial was also tried before Judge Hague and a jury on September 20 and 21, 1993. Following a five-week trial, plaintiffs dropped their defamation claims against Geller based on lack of evidence.[3] T90-6 to T90-9, 8/13/93 A.M. Session; Pet. App. 30-36. Defendants Ziemke, Shar and ITAS' cross-claims against Geller were denied by the trial court and rejected by the jury. T55-6 to T58-14, 8/13/93 P.M. Session; Pet. App. 30-43.

On August 13, 1993, at the conclusion of trial, and *out of the presence of the jury*, Judge Hague stated that he would decide this case sitting as an Israeli judge without a jury[4]. T112-5 to T112-9, 8/13/93 P.M. Session. He allowed the jury to deliberate under

3. And not because "Geller gave trial testimony favorable to the Almogs," as the petition improperly claimed at Pet. 4.

4. A decision made in response to *the defendants' own motion regarding choice of law.*

New Jersey law, and to enter what *he called* an "advisory" opinion. *Id.* However, no mention was ever made of an advisory jury either prior to trial or during trial, and the jury was never informed of its "advisory" role. Accordingly, the Appellate Division properly held that "this jury never functioned as or was constituted or denominated as an advisory jury." *Almog, supra*, 298 N.J. Super. at 160.

The trial judge found defendants liable to the Almogs and Geller in defamation. Pet. App. 37-43. On August 16, 1993, the jury also found in favor of Geller and the Almogs. Da 461 to 465; Pet. App. 30-36. After answering a jury interrogatory indicating a desire to award punitive damages to Almog and Geller, the jury returned on September 20-21, 1993 to hear additional evidence regarding defendants' financial condition. However, defendants refused to provide the requested documentation of their assets and wealth. Geller App. 1a-5a.

The jury awarded compensatory damages in the amounts of $40,000 for Geller; $1,274,000 for Shalom Almog; and $200,000 for Irit Almog; the jury also awarded punitive damages in the amounts of $4,500,000 for Almog and $1,000,000 for Geller. Pet. App. 30-36.

Defendants appealed to the Appellate Division; Almog and Geller cross-appealed and requested that the jury's verdict on both compensatory and punitive damages be reinstated as the final verdict. The Appellate Division properly held that:

> (1) New Jersey was appropriate choice of forum; (2) New Jersey law, rather than law of Israel, applied to action; (3) reversal of bench verdict, rendered in accordance with law of Israel was warranted; (4) elevation of jury's verdict applying New Jersey law as judgment was proper after reversal of trial court's decision to disregard verdict and render bench verdict; (5) unitary verdict of joint liability without individualized verdicts as to each or allocation of responsibility among [defendants] was entirely appropriate; and (6) punitive damage awards were commensurate with evidence of defendants' wealth and represented, considering egregious nature of torts,

acceptable ratio between compensatory and punitive damages.

Almog, supra, 298 N.J. Super. at 146.

D. The Trial Judge Was Not Inattentive During Trial And Thus Defendants Were Not Deprived of Review.

The petition places unwarranted importance upon the bench verdict, from which defendants are not even appealing. Pet. 21. When the jury verdict became the law of the case, the sufficiency of the trial judge's findings was rendered moot. However, defendants continue to claim that the trial judge was inattentive and thus the defendants were denied meaningful review at the trial level. This contention is simply absurd.

The trial judge presided over a 5 1/2 week trial which jurors were originally told would probably last 2 weeks. During some excruciatingly detailed and boring testimony during the middle of the summer, the trial judge attempted on numerous occasions to keep the jury's interest and attention by reminding them of their importance in the process as the finders of fact and often described their duties as the most important function in the process. To emphasize his point, on a couple of occasions, the experienced trial judge even suggested that the jury function was so important that he could attend to other judicial tasks while trial testimony was being provided. However, to suggest that these few statements by an extraordinarily patient and experienced jurist interfered with defendants' due process rights is simply ludicrous.

It is worth noting that defendants' counsel on the Petition was not their trial counsel and did not attend any portion of the proceeding. In fact, despite the trial judge's statements, the trial was actually interrupted only once when someone emerged from the judge's chambers with a message. Despite the judge's instructions that the proceedings could continue, out of respect for the court, all activity and questioning ceased and all counsel waited for the judge's undivided attention. The trial judge did not handle other matters during this case and any comments by the judge anticipating the need to attend to other issues was motivated solely by the judge's insistence on keeping the jury involved in the case.

REASONS FOR DENYING THE WRIT

I.

THE ISSUE OF WHETHER PUNITIVE DAMAGES IN THIS DEFAMATION ACTION ARE UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT DOES NOT WARRANT REVIEW BY THIS COURT.

Generally, a petition for writ of certiorari will be granted only when accompanied by compelling reasons, such as when

> a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

R. 10 of the Rules of the Supreme Court of the United States. This Court should deny the petition because defendants have no basis upon which to appeal the First Amendment issue.

A. Because Defendants Did Not Raise The Issue, The New Jersey Superior Court Appellate Division Never Decided Whether The Punitive Damages Verdict Violated The Free Speech Clause Of The First Amendment.

Prior to their petition for certification to the New Jersey Supreme Court (which dismissed defendants' appeal), the defendants never raised the issue of whether punitive damages in defamation cases are constitutional under the First Amendment. The petition may attempt to explain defendants' failure to raise this issue by stating that the punitive damages verdict was not operative until the Appellate Division entered the jury verdict as the final judgment in the case. Pet. 6. However, the issue of whether New Jersey law (including the punitive damages verdict) should apply was before the Appellate Division for review, if only by virtue of the Geller and Almog cross-appeal. Defendants' only argument against the jury verdict at that time was that "the jury's advisory opinion can never become operative because the jury was instructed as to New Jersey law when Israeli substantive law clearly controls." Db 49. Thus, defendants argued against the jury's verdict in the Appellate Division, but only in the context of whether New Jersey or Israel law applied. Defendants should not be allowed

to raise their previous choice-of-law argument to a constitutional level at this late stage because their initial trial and appellate strategy failed.

Therefore, this Court should deny defendants' petition because defendants have no basis to appeal the First Amendment issue.

B. The Petition Misconstrues The Caselaw Regarding First Amendment Speech And Defamation.

Notwithstanding defendant's failure to raise the issue in the Appellate Division, the First Amendment Free Speech clause does not prohibit punitive damages in private defamation cases involving neither the media, "public figures" nor issues of general public importance, especially when liability is based on knowledge of falsity or reckless disregard of the truth or falsity of the defamatory statements. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985); *see also Turf Lawnmower Repair v. Bergen Record Corp.*, 139 N.J. 392, 655 A.2d 417 (1995).

Acknowledging that this Court "is not concerned with the application of a state choice of law determination," Pet. 9, note 5, defendants now attempt to raise their choice-of-law argument to a constitutional level in order to persuade this Court to grant their petition and rule that the First Amendment prohibits punitive damages in private defamation cases. Pet. 7-16. However, this Court must deny the petition because punitive damages are not constitutionally prohibited in this private defamation matter.

The issue raised in the petition is whether the most rigorous constitutional standards are even implicated in this case, in which defendants admittedly spread malicious, destructive and false gossip in the U.S.-Israeli travel community about their former business colleagues, Geller and Almog. Defendants cite *New York Times*, *supra*, for the following proposition: "The pall of fear and timidity imposed [by large damage awards] is an atmosphere in which the First Amendment freedoms cannot survive." Pet. 14 (citing *New York Times*, *supra*, 376 U.S. at 278). However, Defendants cite this quote out-of-context in a case that determined for the first time, the extent to which constitutional protection for speech and

the press limit a state's power to award damages in a libel action brought by a public official against media defendants who criticize his official behavior, which is totally different from the facts presented in this private defamation action.

Approximately 10 years later in *Gertz*, *supra*, this Court examined the constitutional limits on defamation suits by private-figure plaintiffs against media defendants. In light of the "legitimate state interest underlying the law of libel [in] the compensation of individuals for the harm inflicted on them by defamatory falsehood," the critical determination in defamation actions became the classification of an individual as a public or private figure. *Gertz*, *supra*, 418 U.S. at 341. Defendants cite *Gertz* for the proposition that "in a defamation case, *compensation* for damage to reputation is the *only* legitimate governmental interest." Pet. 9 (citing *Gertz*, *supra*, 418 U.S. at 349) (emphasis added); *see also* Pet. 11, 15. However, the petition does not provide the entire holding of *Gertz*, which limited the recovery of presumed or punitive damages only when "*liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.*" *Gertz*, *supra*, 418 U.S. at 349 (emphasis added). The punitive damages in the present case are permissible under *Gertz* because the jury determined that defendants communicated false and defamatory statements about Geller and Almog with actual knowledge that the statements were false and/or with reckless disregard of their truth or falsity. Da461-465.

A decade after *Gertz* this Court considered the constitutional limits on punitive damages in *Dun & Bradstreet*, *supra*, which involved not only a private-figure plaintiff, but also speech of purely private concern. There, a plurality concluded that

> [i]n light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest [in preserving private reputation] adequately supports awards of presumed and punitive damages even absent a showing of "actual malice."

472 U.S. at 761 (opinion of Powell, J.) (Footnote omitted). This Court reasoned that in cases involving purely private concerns

> there is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press.

Dun & Bradstreet, supra, 472 U.S. at 760. The punitive damages awarded in the present case are permissible under *Dun & Bradstreet*, especially in light of the actual malice standard that was met in this case.

Notwithstanding *Dun & Bradstreet*'s holding, the petition cites this case for Justice White's concurrence which stated that "punitive damages [should be] scrutinized . . . or perhaps even entirely forbidden." Pet. 11 (citing *Dun & Bradstreet, supra*, 472 U.S. at 771). However, the petition ignores the rest of Justice White's concurrence which suggests retaining the common-law rules "where plaintiff is not a public official or figure." *Dun & Bradstreet, supra*, 472 U.S. at 772.

Note also that the petition attempts to distinguish the present case from *Dun & Bradstreet* by stating that *Dun & Bradstreet* "involved commercial speech." Pet. 12-13, note 8. The petition suggests that punitive damages may be limited to cases involving "commercial speech," *Id.*, and proposes that the present case "was non-commercial because it did not 'propose a commercial transaction.' " Pet. 9 (citing *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973)). However, the issue in the present case is not whether the "speech" was commercial, (although many of the defamatory statements here were entirely commercial, both in nature and intent), but whether the defamation concerned anyone other than private individuals, and was about matters of public concern. Defendants do not and cannot argue that this case concerned either public individuals or matters of public concern. Therefore, none of the First Amendment protection issues at the heart of the caselaw on this subject are even implicated in this case. *See Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 775 (1986) ("When the speech is of exclusively private concern and the plaintiff is a private figure, as in *Dun & Bradstreet*, the constitutional requirements do

not necessarily force any change in at least some of the features of the common-law landscape").

The petition also cites *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 818 (1986), for the proposition that "[t]his Court has recognized that constitutional challenges to punitive damages raise 'important issues.' " Pet. 10. While this may be a generally accurate statement, *Aetna Life Ins.* did not specifically concern the issue of punitive damages.

In addition, the petition cites the following quote from Justice Scalia's concurrence in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991): "punitive damages, despite their historical sanction, can violate the First Amendment." Pet. 11. However, once again, the petition ignores the rest of Justice Scalia's concurrence, which states, "[s]ince jury-assessed punitive damages are a part of our living tradition that dates back prior to 1868, I would end the suspense and categorically affirm their validity." *Pacific Mutual Life Ins. Co., supra*, 499 U.S. at 39-40 (Scalia, J., concurring).

Finally, the petition claims that "several state supreme courts" hold the "view that punitive damages violate the First Amendment." Pet. 11 (citing *Stone v. Essex County Newspaper, Inc.*, 330 N.E. 2d 161 (Mass. 1975); *Wheeler v. Green*, 593 P.2d 777 (Or. 1979); and *Tasket v. King Broadcasting*, 546 P.2d 81 (Wash. 1976). However, New Jersey and the majority of the states follow the federal law on this issue, delineate the class of defamation plaintiffs into public or private figures, and conclude that speech not pertaining to matters of public concern rests more lightly on the free speech/reputation interest scale. *See, e.g., Turf Lawnmower Repair, supra.*

In the present case, this Court should follow its precedents and deny the petition. Evidence at trial established that defendants maliciously made false statements of fact about Geller to individuals throughout the United States and Israel that adversely affected Geller's reputation and business.[5] These allegations were untrue

5. T81-16 to T83-20, 8/9/93 A.M. Session; T60-18 to T63-7, T63-9 to T75-21, 8/9/93 P.M. Session; T3-1 to T20-24, T48-12 to T61-14, 8/9/93 Vol. III; T27-9 to T53-20, T96-17 to T100-3, 8/11/93 Vol. I; T86-3 to T87-12, 8/12/93 Vol. I; T57-13 to T58-9, 8/16/93; Cca65-79; Da464; Pet. App. 30-36.

and were admittedly made for the purpose of destroying Geller's personal and professional reputation. *Id.* Based on the evidence presented at trial, the jury determined that all of defendants' defamatory statements against Geller and Almog were not only false, but were made with actual knowledge that the statements were false and/or with reckless disregard of their truth or falsity. Da461-465. No media action will be chilled here by threat of the legal consequences for commercial slander, and no matter of public concern is involved.

This Court should not permit private defendants, who accuse private individuals of idle, destructive and malicious gossip, to hide behind a constitutional shield erected to guarantee meaningful debate about matters of public concern.

II.

THE APPELLATE DIVISION'S CHOICE-OF-LAW DETERMINATION IS A PLAINLY CORRECT APPLICATION OF SETTLED STATE LAW THAT DOES NOT PRESENT ANY CONFLICT WARRANTING REVIEW BY THIS COURT.

The defendants improperly raise their previous choice-of-law argument to a constitutional level, attempting to gain this Court's attention and persuade this Court to grant the petition[6]. However, this Court should deny the petition because the Appellate Division's choice-of-law determination is a plainly correct application of settled law.

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6. In fact, the petition states that

> Defendants are aware that this Court is not concerned with the application of a state choice of law determination, nor should it be. However, when application of that choice of law test intrudes on the free speech guarantees of the First Amendment, as in this case, this Court should become very concerned.

Pet. 9, note 5.

A. The Appellate Division Properly Applied The Governmental Interest Test In Concluding That New Jersey Law Applies Because New Jersey's Interest In Deterring Egregious And Tortious Conduct Is Not Outweighed By Any Substantial Israeli Interest.

First, the constitutional concerns raised by defendants are not at issue in this essentially private dispute. (Refer to Point I, *supra*). *Gertz* distinguished the remedies available for public v. private victims of defamation, and held that "the states may not permit recovery of presumed or punitive damages, *at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.*" *Gertz*, *supra*, 418 U.S. at 349 (emphasis added). To the extent that any perceived constitutional right of free speech is at issue in the present case, the punitive damages are permissible under *Gertz* because the jury determined that defendants communicated false and defamatory statements about Geller and Almog with actual knowledge that the statements were false and/or with reckless disregard of their truth or falsity. Da461-465.

Second, the Appellate Division properly applied the "governmental-interest" test in concluding that New Jersey Law applies because New Jersey's interest in deterring its residents' egregious and tortious conduct[7] is not outweighed by (nor does it offend) any substantial Israeli interest or legal principle. *Almog*, *supra*, 298 N.J. Super. at 158-9 (citing *Gantes v. Kason Corp.*, 145 N.J. 478, 679 A.2d 106 (1996)). In *Gantes*, the New Jersey Supreme Court held that the "governmental interest" test governs New Jersey's choice-of-law disputes. *Gantes*, *supra*, 145 N.J. at 484. The initial prong of the governmental-interest test requires a determination of whether there is an actual conflict between the laws of the respective states. *Id.* Here, the Appellate Division determined that "the heart of the conflicts concern is . . . punitive damages," because "[t]hey are available under New Jersey law, not under Israeli law." *Almog*, *supra*, 298 N.J. Super. at 158. The Appellate Division found that "this difference alone is sufficient to invoke New Jersey law, particularly since a good deal of the

7. And *not* because New Jersey has a superior interest in "deterring speech," as the petition improperly proposes at Pet. 15-16.

defamatory conduct took place in this State as well as elsewhere in the United States." *Id.*

The second prong of the test "requires the court to identify the governmental policies underlying the law of each state and how those policies are affected by each state's contacts to the litigation and to the parties." *Id.* at 485 (citations omitted). *Gantes* recognized that a state's deterrence interest is "a relevant factor to be considered in choice-of-law decisions." *Id.* at 489 (citations omitted). Here, the Appellate Division found that "egregious misconduct was committed in New Jersey, elsewhere in the United States, and in Israel by New Jersey residents," and that "malicious defamation was published in and from this State." *Almog*, *supra*, 298 N.J. Super. at 158. The Appellate Division concluded that New Jersey has an interest in deterring the malicious, tortious conduct of its residents. *Id.* The Appellate Division reasoned that a goal of tort law is "to deter the resident tortfeasor . . . from engaging in . . . wrongful conduct . . . and that deterrence of egregiously wrongful conduct is also what punitive damages are all about." *Id.* at 158-159.

The third prong of the governmental-interest test requires a comparison of "New Jersey's interest in deterrence . . . against any governmental interest that [Israel] has." *Gantes*, *supra*, 145 N.J. at 493. Defendants could never reasonably argue in the present case that Israel has interests in: (1) preventing its residents from being sufficiently compensated for egregious tortious conduct committed by United States' residents; and/or (2) protecting United States residents from punitive damage awards. In the present case, Israel's only legitimate government interest is compensation. The Appellate Division correctly reasoned that Israel's interest in compensating its citizens is adequately addressed by New Jersey law:

> We do not see, and it has not been suggested to us with any particularity, how Israeli law would be offended by the application of New Jersey law in this regard. Certainly the fact that [Israel] does not award punitive damages is not indicative of an interest in whether New Jersey law allows assessment of a punitive damages award against a New Jersey resident. The point . . . is that [Israel's] citizens are not being so assessed.

> By the same token, we do not see how Israeli law can reasonably be regarded as offended by one of its citizens being fully vindicated in the courts of another jurisdiction. In sum, New Jersey's strong deterrent interest does not appear to collide in any appreciable way with the policy of Israeli law.

Almog, *supra*, 298 N.J. Super. at 159. Accordingly, the Appellate Division had "no doubt in light of the totality of the circumstances that New Jersey's interest in the controversy as a whole is paramount to Israel's."[8] *Id.* at 158.

Thus, in light of New Jersey's interest in deterring its residents' egregious conduct, the fact that the dispute is unequivocally centered in the United States, and the lack of a substantial countervailing Israeli interest, the Appellate Division properly applied the "governmental-interest" test in concluding that New Jersey Law applies.

Therefore, this Court should deny the petition because the Appellate Division's decision was a plainly correct application of settled law that presents no conflicts warranting review by this Court.

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8. Contrary to defendants' ridiculous assertion at Pet. 15-16, "deterring speech" was never the "sole basis of [the Appellate Division's] choice of law determination."

III.

THE APPELLATE DIVISION'S DETERMINATION REGARDING DEFENDANTS' DUE PROCESS RIGHTS IS A PLAINLY CORRECT APPLICATION OF SETTLED LAW THAT DOES NOT PRESENT ANY CONFLICTS WARRANTING REVIEW BY THIS COURT.

A. The Appellate Division Correctly Determined That The Jury Charge And Jury Interrogatories, Which Permitted Individual Allocations Of Liability But Did Not Require Them, Were Not Plainly Erroneous In View Of Defendants' Presentation Of Themselves As One "Unit", Defendants' Testimony Revealing That They Jointly Conspired To Defame Geller, And Defendants' Failure To Object Thereto.

Defendants claim that they were denied due process of law because individual determinations of liability were not made as to the compensatory and punitive damages.[9] Pet. 5, 16-20. However, both the trial court and Appellate Division correctly determined that the jury charge and interrogatories, which permitted individual allocations of liability but did not require them, were entirely appropriate under the circumstances, in view of defendants' presentation of themselves as a "unit," defendants' testimony indicating that they jointly conspired to defame Geller, and defendants' failure to object to the jury instructions and interrogatories below.

First, "because defendants raised no objection to the . . . verdict sheet . . . [this Court should] conclude that they have waived any objection to the amount of the award on this basis." *Inter Medical Supplies LTD. v. EBI Medical Systems*, 975 F. Supp. 681, 696 (D. N.J. 1997). In addition,

> [t]his is not a situation in which the error clearly allowed the jury to mistake the burden of proof . . . On the contrary, the jury in this case necessarily evaluated the

9. In support of their petition, defendants refer to N.J. Stat. Ann. § 2A:15-5.13(e) (Supp. 1997) (originally enacted October 27, 1995), which requires allocation of punitive damage awards for each defendant. However, allocation of punitive damages is not required for causes of action filed prior to the effective date of this act. *Id.* (Pet. 19 and 30).

> tortious conduct of all three defendants . . . before arriving at a conclusion regarding punitive damages. Moreover, the jury was properly instructed on the relevant law. The fact that the special verdict sheet invited a "lump sum" award, rather than reflecting a separate amount of punitive damages against each defendant, was a product of the parties' oversight in drafting the verdict sheet, but was not the kind of error that left the jury without adequate guidance on a fundamental question.

Inter Medical Supplies LTD., supra, 975 F. Supp. at 698.

Second, the courts have held that an instruction based on joint and several liability in a cause of action based on slander is not improper. *See, e.g., Refuse & Env. Systems v. Refuse Serv. of America*, 932 F.2d 37 (1st Cir. 1991); *Barlow v. Int'l. Harvester Co.*, 95 Idaho 881, 522 P.2d 1102, 1110-1111 (1974) (holding that recovery against defendants can be based on either proof of conspiracy *or* joint action by defendants). However, the petition insists that the trial court's instruction based on joint and several liability was improper because individual determinations of guilt are required. Pet. 19-20. Even assuming that the petition is correct in its assertion, the court's instruction to the jury was not improper because the facts clearly show that the defendants jointly conspired to defame Geller.

In *Schuping v. Barber*, 89 N.C. App. 242, 249, 365 S.E. 2d 712, 716 (N.C. App. 1988), the court explained that in general, slander is an individual tort, and two or more persons each uttering slander against the same individual may not be held jointly liable *in the absence of a conspiracy between or among them. Id.* (citations omitted) (emphasis added). However, where a conspiracy to utter a slander or publish a libel is shown, each of the conspirators is liable for the slander or libel uttered or published by the others in furtherance of the conspiracy. 53 *Corpus Juris Secondum, Libel and Slander* § 115 at 199 (citing *Lanham v. Keys*, 121 S.E. 856, 31 Ga. App. 635 (1924)); *Schoedler v. Motomerter Gauge & Equipment Corporation*, 15 N.E. 2d 958, 134 Ohio St. 78 (1938) (citations omitted). Simply stated, all of the conspirators are

responsible for all the publications even though no one of them was concerned in all. *Id.* (citations omitted).

In this case, defendants, by their own admissions, jointly conspired to slander Geller and actively participated in each instance of defamation that was committed against him. Just prior to admitting that the motivation behind the letter sent by the defendants to the Israeli tax authorities was to "get even" with Geller, defendant Shar indicated that she and her daughter had always written letters together and did so here. T86-3 to T87-17, 8/12/93, Vol. 1. Likewise, defendant Ziemke repeatedly testified during trial that the defamatory communications were made by both defendants. T66-3 to T66-12, 8/9/93, Vol. 2. Therefore, unlike *Refuse & Env. Systems*, 932 F.2d at 40, cited by the petition, here, each of the acts complained of by the respondents was committed by the defendants in unison. The defendant mother and daughter in this case lived together, worked together, and acted together. During many years of discovery, the defendants did not object and actually encouraged the notion that when one of the principals of ITAS spoke or wrote, they were doing so on behalf of the other individual and the corporate entity. The defendants answered the complaint as one entity and made no effort to disassociate themselves from one another at any time during the course of the trial or their appeals.

> Defendants never argued to the jury that one [defendant] was less culpable than another. therefore, it cannot now be said that the form of the verdict sheet so affected [defendants'] substantial rights that a new trial is merited on that basis.

Inter Medical Supplies Ltd., supra, 975 F. Supp. at 698.

In light of the above, the Appellate Division correctly determined that "if it was error not to require individualized verdicts, that error was not, in the circumstances, plain error." *Almog, supra*, 298 N.J. Super at 161. The Appellate Division properly reasoned that:

> The evidence of defendants' intentional, malicious and egregious wrongdoing was overwhelming. The defendants moreover acted in concert and as a unit, each endorsing and cooperating in the other's actions.

> Indeed, most of the actions were joint. The three defendants were represented by a single attorney. There was no claim by any of the three against any of the others for indemnification or contribution. In these circumstances we are satisfied that the unitary verdict of joint liability without individualized verdicts as to each or allocation of responsibility among them was entirely appropriate. We note, moreover, that defendants did not object on this ground at trial to the judge's charge, which instructed the jury that they could find defendants individually liable or jointly and severally liable, or to the implementing interrogatories submitted to the jury.

Id. at 160-161.

B. The Appellate Division Correctly Determined That The Jury Was Not Considered Advisory Under The Law.

Defendants request this Court to determine whether New Jersey should be permitted to "elevate" an "advisory jury" verdict. Pet. 22-24. However, this Court should deny defendants' petition because the Appellate Division properly determined that the jury was not advisory under the law.

The term "advisory jury,"

> implies a jury known to the parties to be merely advisory at the time of trial (and, for the sake of efficiency, sufficiently in advance of trial that counsel may prepare a case appropriate to the trier of fact).

Thompson v. Parkes, 963 F.2d 885, 889 (6th Cir. 1992); *see also Bereda v. Pickering Creek Indus. Park, Inc.*, 865 F.2d 49 (3rd Cir. 1989); *Pradier v. Elespuru*, 641 F.2d 808 (9th Cir. 1981); *Hildebrand v. Bd. of Trustees Of Mich. S. Univ.*, 607 F.2d 705 (6th Cir. 1979). Thus, a true "advisory jury" occurs in "actions not triable of right [by a jury] . . . on motion or at the court's initiative," but only upon notice to the parties and the jury. *Thompson, supra*, 963 F.2d at 888 (citing Fed. R. Civ. P. 39(c)).

At the conclusion of a five-week trial in the present case, and out of the presence of the jury, the trial judge stated that he would decide this case sitting as an Israeli judge without a jury. He allowed

the jury to deliberate under New Jersey law, and to enter an opinion he later deemed "advisory." However, no mention was made of an advisory jury either prior to trial, or during trial, and the jury was never informed of its "advisory" role; thus the jury "returned its verdict upon due deliberation, and cognizant of its role as the final arbiter of the dispute." *Thompson*, *supra*, 963 F.2d at 890. "The proper course under these circumstances is to direct that judgment be entered based upon the jury's verdict." *Id.*

Accordingly, the Appellate Division properly held that "this jury never functioned as or was constituted or denominated as an advisory jury." *Almog*, *supra*, 298 N.J. Super. at 160. In support of its holding, the Appellate Division properly reasoned that:

> [issues of procedural due process] are obviously not . . . implicated here and defendants do not object to "elevation" of the jury verdict as a conceptual matter. The point, of course, is that it was not until the jury retired to deliberate, after summations and charge, that its status as the final arbiter was challenged. The lawyers proceeded tactically on the understanding that this was a jury trial, as did the court. Nor did the jurors have any inkling during their deliberations that their status was anything but that of ultimate finders of the facts . . . Thus, nothing to the contrary said by the trial judge entered into or affected or tainted the way the lawyers tried the case to the jury or the way the jury deliberated.

Id.

It is notable that the petition refers to the jury as being "advisory" in quotations only, does not dispute the Appellate Division's conclusion that this jury was not advisory, and does not present any law or facts to support that this jury was an advisory jury as that term is defined by the caselaw.

Thus, the Appellate Division properly reinstated the jury's verdict as the final judgment because the jury was not advisory under law.

C. The Trial Court And Appellate Division Provided A Meaningful Review Of Punitive Damages Notwithstanding Defendants' Strategic Decision To Withhold Their Financial Information, And The Appellate Division Correctly Determined That Defendants Waived Their Right To Complain About The Amount Of Punitive Damages.

The petition states that "the Due Process Clause of the Fourteenth Amendment requires that punitive damage awards be reviewed for reasonableness by both the trial and appellate courts," Pet. 24 (citing *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 420-21 (1994) and *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 470 (1993)), and accuses New Jersey of "attempt[ing] to sidestep this protection, thereby eliminating any meaningful review of punitive damage awards." Pet. 24.

Contrary to this ridiculous assertion, the trial court and Appellate Division provided a meaningful review of punitive damages notwithstanding defendants' failure to argue against the amount of the punitive damages verdict in the Appellate Division, and defendants' strategic decision to withhold their financial information and not participate in a proposed remittitur process. Geller App. 1a-5a. Thus, the Appellate Division correctly determined that defendants waived their right to complain about the amount of punitive damages. *Almog*, *supra*, 298 N.J. Super. at 161-162.

Defendants' overriding strategy before, during and after trial has been to provide less than full disclosure of their assets and wealth. Geller App. 1a-5a. Thus, the Appellate Division appropriately determined that defendants waived their right to complain about the punitive damage awards:

> Most significantly, however, following the jury's return of the punitive damages verdict, the trial judge, in an abundance of caution, afforded defendants an opportunity to demonstrate by way of discrete financial records any alleged excessiveness. Defendants failed in the end to take advantage of that opportunity. We are satisfied that they thereby waived their right to complain of the quantum.

Id. at 161-162. The petition may attempt to explain defendants' failure to provide their financial information by stating that the punitive damages verdict was not "operative" until the Appellate Division entered the jury verdict as the final judgment in the case. Pet. 6. However, despite defendants' initial acceptance of the trial court's offer to provide a court-appointed accountant to evaluate the alleged excessiveness of the punitive damage awards in relation to the defendants' assets, defendants suddenly changed their minds and voluntarily opted out of the process, and thereby waived their right to challenge the award. Geller App. 1a-5a.

D. The Punitive Damages Were Commensurate With The Evidence Of Defendants' Wealth And The Malicious And Egregious Nature Of The Defendants' Acts.

The petition also claims that the total damages imposed were so high as to make them unconstitutional under *TXO Production Corp. v. Alliance Resources*, *supra*. Pet. 24-29. However, in *TXO Production Corp.*, the Court did

> not consider the dramatic disparity between the actual damages [of $19,000] and the punitive award [of $10 million] controlling in a case of this character . . . The punitive damages award in this case is certainly large, but in light of the amount of money potentially at stake, the bad faith of petitioner . . . and petitioner's wealth, we are not persuaded that the award was so "grossly excessive" as to be beyond the power of the State to allow.

Id., 509 U.S. at 462.

In addition, the petition states that "[j]udicial review of the size of punitive damages awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded," Pet. 18 (citing *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 421 (1994)), and that "defendants were deprived entirely of meaningful appellate review" in this case. Pet. 17-18, *see also*, Pet. 21-24. However, in *Honda Motor Co., Ltd.* the defendants were entirely deprived of judicial review because Oregon removed the procedural safeguard providing for judicial review of punitive damage awards; thus, this Court determined that such removal

violated the Due Process Clause of the Fourteenth Amendment. *Honda Motor Co., supra*, 512 U.S. at 432. Unlike the state of Oregon in *Honda Motor Co.*, here, even though "defendants [did] not challenge the amount of punitive damages allowed by the jury," the Appellate Division "carefully examined the evidence adduced at the punitive damages trial" and held that:

> the awards were commensurate with the evidence of defendants' wealth and represent, considering the egregious nature of the torts, an acceptable ratio between compensatory and punitive damages.

Almog, supra, 298 N.J. Super. at 161.

Finally, Geller's punitive damages award is permissible under *BMW Of North America, Inc. v. Gore*, 517 U.S. 559 (1996). In *BMW*, this Court provided guidelines to determine whether punitive damages are unconstitutionally excessive. *Id.* There, BMW had adopted a nationwide policy to limit disclosure of minor pre-sale repairs to new car purchasers. *Id.*, 517 U.S. at 562. This Court determined that BMW's "conduct was not sufficiently egregious to justify the severe punitive sanction imposed against it." *Id.*, 517 U.S. at 561.

In *BMW*, this Court initially considered the degree of reprehensibility of the defendants' conduct. *Id.*, 517 U.S. at 560. In reversing the $2 million punitive damages award, this Court found "no evidence either that BMW acted in bad faith . . . that BMW engaged in deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive." *Id.* In addition, this court noted that "repeated misconduct is more reprehensible than an individual instance of malfeasance," *Id.*, 517 U.S. at 577, and found "no evidence that BMW persisted in a course of conduct after it had been adjudged unlawful on even one occasion, let alone repeated occasions." *Id.*, 517 U.S. at 579.

Contrary to this Court's findings in *BMW*, the defendants' conduct in the present case was particularly egregious in that defendants exhibited bad faith, engaged in repeated deliberate false statements and affirmative acts of misconduct. Thus, the Appellate Division appropriately determined that

> defendants Shar and Ziemke and their company took concerted, malicious and purposeful action over a significant period of time to destroy both Almog and Geller as respected members of their community, that they did so with total disregard of the truth or of the personal consequences to them and their families, and that in large measure they succeeded.

Almog, *supra*, 298 N.J. Super. at 153.

While this Court has consistently refused to draw any mathematical line for excessiveness, the ratio of the punitive damages award to the compensatory award is an additional factor to consider. *BMW*, *supra*, 517 U.S. at 581. In *BMW*, the ratio between the plaintiff's punitive damages award and amount of actual harm as determined by the jury, was 500 to 1. In the present case, the ratio between Geller's punitive damages award and compensatory damage award as determined by the jury, was substantially less, at 25 to 1. In light of the reprehensibility of defendants' acts and the nature of the damage done to reputation, such a ratio is not unconstitutionally extreme.

> The Supreme Court of New Jersey has recognized that the reasonableness of the relationship of punitive damages to actual injury must be considered in light of other factors in each case. *Fischer v. Johns-Manville Corp.*, 103 N.J. 643, 673, 512 A.2d 466 (1986). As that court noted, "particularly egregious conduct may generate only minimal compensatory damages." *Id.* When that happens, "higher punitive damages would be justified than when substantial compensatory damages are awarded." *Id.*

Inter Medical Supplies Ltd., *supra*, 975 F. Supp. at 701. "Therefore, one naturally expects a much lower ratio when a substantial award of compensatory damages has been made." *Id.* (citing *BMW*, *supra*, 517 U.S. at 582 ("low awards of compensatory damages may properly support a higher ratio than high compensatory awards").

Moreover, "[i]n New Jersey, the purpose of an award of punitive damages is to punish the defendant and to deter that defendant from repeating such conduct." *Inter Medical Supplies*

Ltd., *supra*, 975 F. Supp. at 695. Given the significant wealth of the defendants and egregiousness of their tortious conduct, only a high punitive damages verdict could effectively punish these defendants and deter them from repeating similar harmful conduct.

It is also reasonable to assume that the jury fully appreciated the inherent difficulty in assessing compensatory damages in the travel and tourism business, and was aware that a defamation plaintiff may have no way to precisely determine the extent of his reputation damages and lost business opportunities.

An additional consideration stated in *BMW* is the difference between the punitive damages award "and the civil or criminal sanctions that could be imposed for comparable misconduct." *BMW*, *supra*, 517 U.S. at 583. The petition addresses this consideration by referring to the New Jersey Punitive Damages Act, N.J. Stat. Ann. § 2A:15-5.9 *et seq.* (West 1998). Pet. 30. However, the petition accurately states that this Act was enacted long after the lawsuit in the present case was filed, and, therefore, does not apply. Pet. 30.

Thus, the trial court and Appellate Division provided a meaningful review of punitive damages, notwithstanding defendants' strategic decision to withhold their financial information and refusal to participate in a remittitur process, and the Appellate Division correctly determined that defendants waived their right to complain about the amount of punitive damages.

Therefore, this Court must deny defendants' petition because the Appellate Division's determination regarding defendants' due process rights is a plainly correct application of settled law that does not present any conflicts warranting review by this Court.

CONCLUSION

In view of the foregoing, it is respectfully requested that this Court deny defendants' petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — CORRESPONDENCE DATED JANUARY 29, 1997 FROM ANDREW S. BERNS, ESQ., SENT IN RESPONSE TO A REQUEST FROM THE HONORABLE SYLVIA B. PRESSLER, P.J.A.D., AFTER ORAL ARGUMENT IN THE APPELLATE DIVISION, REGARDING DEFENDANTS' HISTORY OF REFUSALS TO DISCLOSE THEIR FINANCIAL INFORMATION

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5142-1

January 29, 1997

Via Lawyers Service
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Appendix A

Honorable Burrell I. Humphreys, J.A.D.
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Appellate Division
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Re: **Almog v. ITAS, et al.**
Docket No. A-1679-93-T3

Dear Honorable Judges of the Appellate Division:

Pursuant to the Court's instruction subsequent to the oral argument of this matter on January 28, 1997, enclosed please find the post-trial motion transcript of November 19, 1993. The November 19, 1993 transcripts address the defendants' post-trial motions below for a new trial pursuant to *R.* 4:50-1. The Court will note that I have included the complete transcript of this date's argument which includes two volumes. The Court will further note that the November 19, 1993 transcript was originally included in plaintiffs' Appendix at Pa604. Unfortunately, upon review, Pa604 includes only a portion of the transcript and accordingly I am now supplying the Court with the complete underlying record from below.

Additionally, at oral argument, the Court expressed interest in the trial court's handling of issues associated with a possible remitter in the evaluation of the jury's punitive damage award. The procedural history of these events is all contained in the record below and I am including in this package copies of said documents for the Court's convenience in evaluating this issue. The additional documents are as follows:

Appendix A

1. Da598 through Da606 is an unabridged copy of Point XXIII from defendants' Motion for a new trial which sets forth the defendants' sole basis of objection to the punitive damages from the jury verdict below. The Motion for a new trial was filed on or about October 18, 1993 and was argued before the Court on November 19, 1993.

2. Pa130-131, correspondence from the Honorable Douglas T. Hague dated October 1, 1993. This correspondence constituted the Court's offer to appoint a court-appointed accountant to assist the Court in an evaluation of the jury's punitive damage award.

3. Pa205-206, correspondence dated October 8, 1993 from defendants' trial counsel to Judge Hague accepting the Court's proposal for a court-appointed accountant.

4. Pa137, correspondence dated February 23, 1994 from Judge Hague to all trial counsel describing the court-appointed accountant's inability to gain the cooperation of defendants and their accountants in evaluating the punitive damages award.

5. Pa138-140, correspondence from defendants' appellate counsel, H. Neil Broder to Judge Schwartz explaining the defendants' position with respect to the court-appointed accountant and identifying that it is the defendants' position that an advisory jury verdict can never become operative and that the defendants have chosen to appeal this issue directly to the Appellate Division.

6. Da887-888, the trial court's Order of January 14, 1994, denying defendants' Motion for an Order granting a new trial or for judgment notwithstanding the verdict.

Appendix A

The trial court found at the November 19, 1993 hearing that when the jury made its punitive damage award it "was acting, and properly so, on evidence and had the right to conclude that the constant obstruction on the part of the defendants was sufficient for them — that is the jury to draw an adverse inference on the — the worth of the corporate and individual defendants." (November 19, 1993, transcript 6:1-6). Thus, the trial court preliminarily found that the jury's punitive damage award was supported by sufficient evidence.

Despite this finding, the trial court offered to appoint an accountant at the defendants' expense to give the defendants a chance to provide the trial court with the financial and economic information that the defendants contumaciously withheld from the plaintiffs, crossclaimant and the jury during the punitive damages phase of the trial. The trial court thus invited the defendants to show that the punitive damage award was excessive — that the award would destroy rather than just punish the defendants. The trial court went so far on November 19 as to defer any ruling directly on the issue of punitive damages until the court-appointed accountant had a chance to make a report to the Court. *See*, November 19, 1993, transcript at 49-17 to 19.

The defendants, however, refused to provide the accountant with any information and subsequently declined the trial court's invitation to revisit the punitive damage award. Thus, the defendants tactically chose to withhold from the trial court and its accountant any new information necessary to determine a remitter and abandoned the procedure offered by the Court to review the punitive damage award. The defendants do *not* here appeal from any adverse ruling by the trial court as to any post-trial motion going to the punitive damage award. It is

respectfully submitted that the defendants have no basis for seeking redress at this juncture in the Appellate Division. This Court should reasonably infer that the defendants made a tactical decision that such disclosure would have not been helpful in obtaining a remitter.

I have enclosed the above information at the Court's request and to resolve what appeared to me to be some procedural confusion at the time of the oral argument. If the Court believes that the presentation of this information should be presented in a formal Motion, please advise.

Respectfully submitted,

s/ Andrew S. Berns
ANDREW S. BERNS

ASB/amm
Enclosures
cc: David Feinsilver, Esq. (via lawyers service)
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